STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

VICTORIA LEIGH BROTHERS,

Plaintiff,

-against-

CITY OF TROY, NEW YORK,

Defendant.

THE CITY OF TROY, NEW YORK,

Third- Party Plaintiff,

-against-

ALICIA M. MENNILLO

Third-Party Defendant.

All Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
RJI: 41-0690-2017 Index No. 255157

Appearances:

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DECISION/ORDER

Zwack, J.:

In this personal injury action, the defendant City of Troy moves for summary judgment dismissing the complaint of the plaintiff Victoria Leigh Brothers, asserting that the plaintiff has failed to identify the defect which caused her fall and resulting injuries, and that any dangerous condition with the property it owns (known as the former Leonard Hospital) was open and obvious and as such, it had no duty to warn the plaintiff of its condition. The defendant further argues that the plaintiff's injuries were the result of her trespass, which was a serious violation of law, and that she should not be allowed to profit from her own wrongdoing.

The plaintiff opposes, and cross moves for partial summary judgment on the issue of liability. The plaintiff argues that as a matter of law, the defendant City of Troy failed to maintain it's abandoned Leonard Hospital property in a reasonably safe condition despite a clear ability to do so.

According to the Complaint, the plaintiff was injured on July 4, 2016 when she fell 20 feet from a raised platform attached to a window ledge at the former Leonard Hospital (74 Turnpike Road in Lansingburgh, New York) owned by the City of Troy. On the night of the accident, the plaintiff and friends entered the vacant and long abandoned hospital through a

window accessible from a ledge, with the intent of watching the fireworks from the roof of the building. Following the fireworks, they exited the building through the same window. While waiting for the last person to exit the window, the plaintiff took two steps to her left and fell from the ledge. The plaintiff alleges two causes of action, the first negligence, and the second failure to cure what defendant knew to be a dangerous site which was attractive to individuals, including children.

The defendant City thereafter commenced a third party action against Alicia M. Mennillo, who was with the plaintiff when the accident occurred, for contribution and indemnification. The third-party defendant has also moved for summary judgment — which will be addressed in a separate decision and order.

It is well established that summary judgment is a drastic remedy that cannot be granted where there is any doubt as to the existence of a triable issue of fact or where an issue is even "arguable" (*Glick & Dolleck v TriPac Export Corp.*, 22 NY2d 439 [1969]). The party seeking summary judgment must make a prima facie showing his or her entitlement to judgment as a matter of law and produce evidence sufficient to demonstrate that there are no material issues of fact (*Vega v Restani Constr Corp.*, 18 NY3d 503 [2012]). Once the moving party has demonstrated entitlement to summary

judgment, the burden shifts to the opponent to demonstrate by admissible evidence the existence of a material issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

"To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027 [1985], citations omitted). "The threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff?" (*Hamilton v Berretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]). This question rests within the determination of the Court as a matter of law, and must be determined prior to the submission of any factual issues to a jury (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994]).

Here, the Court is mindful that the defendant City, as a landowner "has a duty under common law to maintain its premises in a reasonably safe condition in view of all circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Kellman v 45 Tieman Associates, Inc.* 87 NY2d 871 [1995], citations and quotations omitted). Further, the City, as the owner of the subject former Leonard Hospital owed all persons on that property a duty

of reasonable care, and "considerations of who plaintiff is and what (her) purpose is upon the land are factors, which if known, may be included in arriving at would be reasonable care under the circumstances" (*Basso v Miller*, 40 NY2d 233, 241 [1976]). This said, for the defendant City to be liable to a person on the subject property for an injury the plaintiff must establish three basic elements: [1] that a dangerous condition existed on the property; [2] that the defendant City created or had notice of it; [3] and that the defendant City failed to "remedy the danger presented...after actual and constructive notice of the condition" (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]). In this analysis, a factor to be considered is whether the defendant City was compliant with controlling Building Codes or other relevant industry-wide standards (*Schmidt v One New York Plaza Co., LLC*, 153 AD3d 427 [1st Dept 2017]).

On this record, the defendant City of Troy has failed to establish it's prima facie entitlement to summary judgment. However viewed the defendant failed to demonstrate, here through the use of it's attorney affidavit incorporating the various deposition testimony of plaintiff and the witnesses, that it maintained the premises in a reasonably safe condition and neither created nor had actual notice of the allegedly dangerous condition (*Riozzi v 30 Kingston Reality Corp.*, 112 AD3d 1033 [3d Dept

2013]). The attorney affidavit alone is insufficient as it is not based upon first hand knowledge of the facts (*Bronson v Algonquin Lodge Ass'n Inc.*, 295 AD2d 681 [3d Dept 2002]). Albeit the City asserts that it maintained the abandoned Leonard Hospital in a reasonably safe manner, the argument is belied by the deposition testimony of the witnesses which have been attached to the defendant's motion — particularly that of the plaintiff and the third-party defendant Alicia Mennillo. In the motion the City also argues, incongruently, that it is entitled to summary judgment because the plaintiff has failed to identify the specific dangerous condition that led to her accident, and that any dangerous condition was "open and obvious" and it had no duty to warn. Both these diametrically opposed arguments are without merit in light of the deposition testimony.

The defendant City also argues — but fails to demonstrate or establish — that the plaintiff's trespass upon the Leonard Hospital property was a "serious crime" such that the City is absolved from its responsibly to maintain the property in a safe condition. "A complaint should not be dismissed merely because the plaintiff's injuries were occasioned by a criminal act...(and requires more, including that) the plaintiff's injury is the direct result of his knowing and intentional participation...(in a) criminal act...judged to be so serious an offense as to warrant denial of recovery"

(*Barker v Kallash*, 63 NY2d 19, 25 [1984], citations omitted). Due consideration must be given to all of the relevant facts and circumstances before such an extreme result can be imposed (*Hathaway v Eastman*, 122 AD3d 964 965 [3d Dept 2104]). The plaintiff clearly testified at her deposition, which the defendant has produced, that she knew many people who had gone there (to the abandoned property) and didn't get hurt; she didn't see any "no trespassing signs"; she did not realize she was trespassing and she didn't know who owned the property; and she testified "I didn't know that it was illegal or not okay for me to be there." Certainly the intention to commit an offense is an important consideration when determining the seriousness of the offense, and it is absent here. Further, the record is replete with examples of trespass at the former Leonard Hospital, without any resulting criminal sanction by the City.

Ordinarily, because the defendant City has failed to establish it's entitlement to summary judgment as a matter of law, it would not be necessary for the Court to reach the arguments raised by the plaintiff. Here, however, the plaintiff has cross-moved for summary judgment on the issue of liability, looking for a determination as a matter of law that the defendant City failed to use reasonable care in maintaining the property where the plaintiff was injured. In support of her motion, the

plaintiff produced an expert, Conrad Hoffman, P.E., who opined that the City failed to maintain the property in a safe and secure manner and was in violation of its own City Building Code. At the time of the plaintiff's injury, the Building Code of the City of Troy, Section 141-18, required the abatement by repair, rehabilitation, or demolition of all "structurally unsafe, vacant [buildings]...or [buildings] which in relation to existing use constitute a hazard to safety or health by reason of inadequate maintenance...or abandonment are...unsafe buildings. All such unsafe buildings are hereby declared to be illegal and shall be abated by repair and rehabilitation or by demolition...."

The deposition testimony of Captain Montanino of the City of Troy Police, and the testimony of Alicia Mennillo establish that the defendant City did fail to follow the directives of its own Code — by failing to abate the conditions, repair and or tear the building down — and is evidence of the City's negligence *(Elliott v City of New York*, 95 NY2d 730, 734 [2001]) — which beyond argument, the City simply failed to offer any opposing proof. The record establishes that the defendant City was repeatedly called to reinforce it's previous efforts to secure the subject building, such as the recurring open windows, that the recurring open window became a known and foreseeable risk, and that the City's abatement efforts (re-attaching the

plywood covering) were insufficient. Here, it simply cannot be said that the City did not have notice that the former Leonard Hospital was an attractive nuisance, and that it was repeatedly and continually broken into by members of the community. Captain Montanino testified that there had been two serious injuries at the abandoned hospital prior to the plaintiff's accident, in 2014 and 2015, as well as over 300 calls to the City regarding encroachment on the property since the hospital was abandoned — invariably involving trespassers entering the former hospital through windows which were not boarded up or inadequately boarded, including some accessible from the same ledge where the plaintiff fell. On this record, there is simply no material issue of fact as to whether the City breached its duty of care to reasonably and adequately abate the danger posed by the abandoned Leonard Hospital. Further, particularly considering the many undisputed complaints of trespassers entering the building through open windows, there is no merit to the defendant City's argument that it had reasonably and adequately abated any danger posed by the abandoned building.

The plaintiff's expert, Mr. Hoffman also points out that The Property Maintenance Code of New York also requires, at section 302, that a handrail or a guardrail is required on a raised platform walking surface.

It goes without saying that a handrail or a guardrail would have prevented the serious injuries suffered by the plaintiff, and would have been a reasonable step in abatement given the City's knowledge that trespassers were using that ledge on a regular basis to gain access to the building. However viewed, a violation of section 302 of the Property Maintenance Code is negligence per se (*Byne v Nicosia,* 104 AD3d 717, 719 [2d Dept 2013], citations omitted).

Most damning, however, is the testimony of third-party defendant Alicia Mennillo. In her deposition testimony, she recounts that she entered the former Leonard Hospital no less than five times, each time entering through unboarded windows or by removing the plywood from the windows. She testified that on the night of the plaintiff's injury the window the group entered was not boarded up. She also testified that it was easy to gain access to the building, and go inside, as there were no barriers, no fence, no motion detectors, and no "no trespassing" signs or warnings. She further testified that there was a ladder that gave them easy access to the roof. Ms. Mennillo was also present inside the building when a person was injured in May 8, 2015, and although she was questioned, she was not charged with trespassing.

All said, there is simply no question that the defendant City had actual notice of the dangerous condition, and attractive nuisance, of the abandoned former Leonard Hospital. Instead of effectively abating the hazards the property presented, or demolishing the vacant building, the City persisted in repeating the same inadequate measures — such as repeatedly replacing plywood over the same windows that was repeatedly removed by trespassers — thus failing to properly secure the property. It was not until the plaintiff's injury that a fence was erected around the property, and although there is some dispute as to its effectiveness, Captain Montanino testified, as of the date of his deposition, that there had been no further reports of trespass at the hospital.

Here, the plaintiff established her prima facie entitlement to summary judgment as a matter of law on the issue of liability. The record establishes that the defendant City failed to effectively abate — whether to repair, remediate, or demolish — the hazard presented by the abandoned former Leonard Hospital, property the City owned since on or about 2012, and that the City had notice and knowledge that individuals,[1] such as the plaintiff, regularly trespassed on the subject property, including access to

[1] As pointed out by the plaintiff, on June 14, 2014 — 2 years prior to the plaintiff's accident — another person was seriously injured when she fell through a skylight at the former hospital.

the same or similar second floor windows as accessed by the plaintiff, and failed to take reasonable measures to prevent injury. In opposition, the defendant City, beyond argument, failed to raise a triable issue of fact.

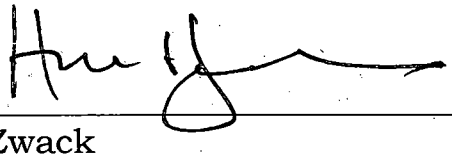
Accordingly, it is

ORDERED, that defendant City of Troy's motion for summary judgment is denied, and it is further

ORDERED, that plaintiff's motion for partial summary judgment on the issue of negligence is granted.

This constitutes the Decision and Order of the Court. This original Decision and Order is returned to the attorneys for the plaintiff. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: March 13, 2019
Troy, New York



Henry F. Zwack
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion for Summary Judgment by Defendant City of Troy, dated December 18, 2018 with Exhibits "A" through "P"; Affirmation of Ryan P. Bailey, Esq., dated December ; Memorandum of Law;
2. Notice of Cross-Motion, dated December 31, 2018 with Exhibits "A" through "H"; Affidavit of Peter J. Hickey, Esq., sworn to on December 31, 2018; Affidavit of Conrad Hoffman, P.E., sworn to on December 31, 2018;
3. Reply Affirmation of Ryan P. Bailey, Esq., dated January 11, 2019; Affidavit of Michael P. Tracey, sworn to on January 14, 2019, together with Exhibit "A"; Affidavit of Sean Kiley, sworn to January11, 2019, together with Exhibit "A";
4. Reply Affidavit of Peter J. Hickey, Esq., sworn to on January 17, 2019; Expert Reply Affidavit of Conrad P. Hoffman, P.E., sworn to on January 16, 2019.